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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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vs.

JOSEPH W. EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners Oscar Mayer & Co., Robert M. Bolz, N. D. Ottens, Donald L. Paul, and Paul F. Gould respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 6, 1978.

OPINIONS BELOW.

The Opinion of the District Court for the Southern District of Iowa of July 8, 1977, denying petitioners' Motion to Dismiss is reported unofficially at 17 FEP Cases 218 and is reproduced in Appendix A herein (App. A1-A7). The Opinion of the Court of Appeals of April 5, 1978, reversing the trial court, is unofficially reported at 17 FEP Cases 221 and is reproduced in

Appendix A herein (App. A8-A14). The Court of Appeals' Opinion on Rehearing issued on July 6, 1978, withdrawing its Opinion of April 5, 1978, and affirming the trial court, is unreported and is reproduced herein in Appendix A (App. A15-A21).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 6, 1978 (App. A15-A21). Petition for rehearing en banc was denied on July 7, 1978 (App. A22). Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals for the Eighth Circuit erred in finding that the commencement of proceedings in a timely fashion before a state agency is not a mandatory prerequisite to the institution of a civil suit under the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.* in states having laws prohibiting age discrimination in employment and establishing agencies empowered to grant or to seek relief from such discriminatory practices.

STATUTES INVOLVED.

This case involves the interpretation and application of Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b) (hereinafter referred to as the "ADEA") and Section 706(b) of Title VII of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5(c). These statutory provisions are reprinted in full in Appendix B (App. A23-A24).

STATEMENT OF THE CASE.

This case raises a question of fundamental importance under the ADEA, *i.e.*, whether resort must be had to a state agency

having jurisdiction over claims of age discrimination before proceeding in the federal district courts.

Petitioner Oscar Mayer & Co. ("Oscar Mayer") is a corporation incorporated under the laws of the State of Delaware, and is licensed to do business in Iowa. It owns and operates a number of plants throughout the country, including a plant in Davenport, Iowa.

Respondent was employed by Oscar Mayer as a hog buyer for 23 years until his retirement on January 31, 1976. Although he was assigned to the Davenport plant, his buying station was located at Williamsburg, Iowa.

On March 10, 1976, respondent filed with the United States Department of Labor a notice of intent to sue under the ADEA, claiming that he was "forced" to retire and that his termination was in violation of the ADEA.

The Iowa Civil Rights Act of 1965, as last amended in 1974, prohibits age discrimination in employment and entrusts enforcement of this Act to the Iowa Civil Rights Commission. Section 601, A. 5, 6, Code of Iowa (1975). Any person claiming to be a victim of unlawful discrimination under this Act must file a complaint with the Commission within 120 days of the alleged discriminatory practices. Section 601, A. 14(1), (15), Code of Iowa (1975).

Despite these statutory provisions, respondent never filed a complaint with the Iowa State Civil Rights Commission. Instead, on March 7, 1977, filed a complaint with the United States District Court for the Southern District of Iowa, Davenport Division, alleging that he was discharged in violation of the ADEA.

Petitioners moved to dismiss the complaint for lack of jurisdiction over the subject matter due to respondent's failure to file a timely complaint of age discrimination with the Iowa State Civil Rights Commission as required by Section 14(b) of the ADEA, 29 U. S. C. § 633(b). On August 8, 1977, this motion

was denied by Judge W. C. Stuart, who held that the filing of an age discrimination claim with a state agency is not a prerequisite to the institution of a civil suit under the ADEA (App. A1-A7).

On appeal, the Court of Appeals for the Eighth Circuit, on April 5, 1978, initially reversed the decision of the district court and held that resort to the state agency was required under the ADEA. Judge Bright, writing for the majority stated:*

> "We conclude that, in a state having laws that prohibit age discrimination and having an agency with authority to seek relief from such practices, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court." (App. A11.)

Shortly thereafter, respondent filed a petition for rehearing and suggestion for rehearing en banc. Respondent was supported in his position by the Secretary of Labor, who, on April 26, 1978, was permitted to file an amicus curiae brief. On July 6, 1978, a divided panel of the Court of Appeals withdrew its opinion of April 5, 1978 and affirmed the district court's order. Judge Henley, who originally dissented, wrote the majority Opinion on Rehearing, noting that "the authorities are in conflict, and the question is not free from doubt". He went on to hold, however, that the "preferable view" was that an individual was not required to file a complaint with a state agency before instituting a civil suit. (App. A18-A19.)**

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* Judge Bright was joined in his opinion by Judge Talbot Smith, United States Senior District Judge, Eastern District of Michigan, sitting by designation. Judge Henley dissented.

** Judge Henley was joined by Judge Smith who had concurred in the court's original opinion that an individual was required to file a timely complaint with a state agency before instituting suit under the ADEA. Judge Bright, consistent with his opinion of April 5, 1978, dissented to the Court's opinion of July 6, 1978.

REASONS FOR GRANTING THE WRIT.

I. A Clear Division of Opinion Exists Between the Circuit Courts of Appeal on the Issues Presented by This Petition.

At the present time, four other circuit courts of appeal have been faced with the question of the proper interpretation of Section 14(b). They have divided evenly on this issue. The Courts of Appeal for the Third and Sixth Circuits have issued decisions consistent with the court below. *See Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, (6th Cir. 1978); *Simpson* v. *Whirlpool Corp.*, 573 F. 2d 957 (6th Cir. 1978); *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, ... F. 2d ....., No. 77-140 (3rd Cir. July 14, 1978). However, the Courts of Appeal for the Second and Ninth Circuits have rendered decisions which are diametrically opposed to the view expressed by the court below. *See Reich* v. *Dow Badische Co.*, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. April 14, 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975).

In *Reich*, the Court of Appeals for the Second Circuit reasoned as follows:

> "Much of Appellant's argument mistakenly proceeds on the tacit premise that resort to the state remedy is a technical step devoid of substantive content, and that, therefore, the slightest showing will warrant setting the bar of Section 633 (b) aside. That ignores the paramount circumstances, that the state remedy, or rather remedies, presented appellant with a full and adequate system of relief, and that there was no reason for turning to the federal remedy that did not equally direct the appellant to the state remedies, and that the scheme of the ADEA very explicitly requires that the grievant timely present his claim to the state authority before suing." ..... F.2d at ....., 17 FEP Cases at 367-368.

And, in *Curry*, the Court of Appeals for the Ninth Circuit reached this conclusion:

> "[W]e concur in the reasoning of those courts that have held decisions interpreting 42 U.S.C. § 2000e-5(b) [as amended 42 U.S.C. § 2000e-5(c)] . . . to be generally applicable for purposes of interpreting § 633(b). [Citation omitted.] 'The minor differences between § 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to' interpretations of the latter. *Goger., supra,* at 16." 513 F.2d at 693 [Footnote omitted.]

The current confusion existing among the various circuits concerning this issue is further evidenced by the conflicting decisions of the Eighth Circuit. The Court's decisions of April 5, 1978 and July 6, 1978 are directly contrary to one another and both were rendered by divided panels. Indeed, even Judge Henley's opinion of July 6, 1978 noted that "the authorities are in conflict and the question is not free from doubt." (App. A18-A19.)

Congress drafted the ADEA in a manner designed to resolve age discrimination claims in the most expeditious fashion possible. *See* 113 Cong. Rec. 7076 (Remarks of Senator Javits). The courts have thus recognized that interpreting Section 14(b) as establishing a mandatory prerequisite to the commencement of a civil suit under the ADEA furthers this intent since the state agency will always be given a fixed, limited period of sixty days in which to resolve claims of age discrimination before the aggrieved individual can institute suit in federal court. *See Reich* v. *Dow Badische Co.,* ..... F. 2d ....., 17 FEP Cases 363, 367 (2d Cir. April 4, 1978) ("Deference to the state procedures where they exist is fundamental to the ADEA structure.") During this same sixty day period, the Secretary of Labor may also endeavor to settle the dispute since, under section 7(d) of the ADEA, 29 U. S. C. § 626(d), an individual must wait sixty days after filing his notice of intent to sue with the Secretary before instituting suit. *See Rogers* v. *Exxon Research Engineering Co.,* 550 F. 2d 834, 841, *cert. denied,* No. 76-1451, ... U. S. ....., 98 S. Ct. 749 (January 9, 1978) ("Private

lawsuits are secondary to administrative remedies and suits by the Secretary of Labor.").

By granting an aggrieved individual the "option" of initiating proceedings with the state agency or proceeding directly in federal court, the decision of the court below completely frustrates this intent. Instead of maximizing the possibility of resolving age discrimination claims during the sixty day period following the filing of a notice of intent to sue, the decision of the court below allows an individual to ignore available administrative avenues, remain idle during this sixty day period, and then resort immediately to the federal district courts.

The divergent conclusions which have been reached in the courts of appeals on this issue and the avowed uncertainty expressed by the Court of Appeals for the Eighth Circuit on rehearing is perhaps the best evidence that the issue is one which must be resolved by the Supreme Court. A uniform interpretation of the procedural requirements of the ADEA is required not just to protect the rights of employers seeking to comply with the statute, but to protect the rights of aggrieved individuals as well.

II. The Decision of the Eighth Circuit Court of Appeals Is Contrary to the Plain Language of Section 14(b) of the ADEA.

The decision of the court below contravenes the clear language of Section 14(b) which provides as follows:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in Employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."* (Emphasis added.)

The State of Iowa has a law prohibiting age discrimination in employment and has established the Iowa State Civil Rights Commission to grant or seek relief for such discriminatory practices. Section 601 A.5, 6, Code of Iowa (1975). Further, respondent concedes that he never made any resort to the Iowa Commission for relief.

On rehearing, the court below held that *"an individual has the option* of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency" (Emphasis added; App. A19). This, we submit, is completely inconsistent with the plain language of section 14(b) which provides that *"no suit may be brought before the expiration of sixty days after proceedings have been commenced under the State law."** (Emphasis added.)

Section 14(b) is couched in language almost identical to that appearing in Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), which provides as follows:

> "In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . . , *no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law unless such proceedings have been earlier terminated. . . .*" (Emphasis added.)

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* Section 14(b) is phrased in similar language to section 7(d) of the ADEA, 29 U. S. C. § 626(d), which provides that "[n]o civil action may be commenced . . . until" an aggrieved individual has satisfied certain prerequisites with respect to the filing of a notice of intent to sue with the Secretary of Labor. This language of section 7(d) has consistently been construed as setting forth a mandatory prerequisite to a civil suit under the ADEA. *See, e.g., Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir. 1974).

It has uniformly been held that this section requires prior resort to the appropriate state agencies before suit may be brought under Title VII in the federal district courts. *See Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir. 1975); *Local 5, Electrical Workers* v. *EEOC*, 398 F. 2d 248 (3rd Cir.), *cert. denied*, 393 U. S. 1021 (1968). And, it is because of this similarity in language that the majority of federal courts, faced with the question of interpreting section 14(b), have looked to Title VII for guidance and have thus concluded, contrary to the court below, that this provision sets forth a mandatory prerequisite to a civil suit under the ADEA. *E.g., Reich* v. *Dow Badische Co.*, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. April 4, 1978); *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Enos* v. *Kaiser Industries Corp.*, 443 F. Supp. 798 (D. D. C. 1978); *Fitzgerald* v. *New England Telephone Co.*, 437 F. Supp. 635 (1976), *modified*, 437 F. Supp. 635 (D. Mass. 1977); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976); *Berry* v. *Crocker Nat'l Bank*, 13 FEP Cases 673 (N. D. Cal. 1976); *Acford* v. *Exxon Corp.*, 12 FEP Cases 1500 (D. Conn. 1975); *Arnold* v. *Hawaiian Telephone Co.*, 407 F. Supp. 903 (D. Hawaii 1975); *McGinley* v. *Burroughs Corp.*, 407 F. Supp. 903 (E. D. Penn. 1975); *Smith* v. *Crest Communities, Inc.*, 8 FEP Cases 1328 (W. D. Ky. 1974).

Further, the identity of language between Title VII, which was passed in 1964, and the ADEA, which was passed in 1967, coupled with the fact that both statutes have the same general purpose of remedying employment discrimination, makes the doctrine of *in pari materia* applicable. Under this doctrine, where there is some uncertainty as to the proper interpretation of a later statutory provision, the settled rule of statutory construction is to apply that later statutory provision in the same manner as the former. *See Northcross* v. *Board of Education of the Memphis City Schools*, 412 U. S. 427, 428 (1973). Applying that principle here, Section 14(b) should be interpreted in

the same manner as Section 706(b). The decision of the court below ignores this well-established principle.

It is thus clear that the Eighth Circuit erred in holding that Section 14(b) does not set forth a statutory prerequisite to a civil suit under the ADEA. The plain language of the statute, its similarity to Section 706(b) of Title VII, and well-established rules of statutory construction, compel the conclusion that the original opinion issued by the Court of Appeals for the Eighth Circuit was the one that correctly expresses congressional intent.

CONCLUSION.

For all of the foregoing reasons, we respectfully request that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
Southern District of Iowa
Davenport Division

JOSEPH W. EVANS, *Plaintiff,*
vs.
OSCAR MAYER & Co., et al., *Defendants.*
Civil No. 77-19-D

ORDER.

The matter currently before the Court concerns defendant's resisted motion to dismiss for lack of subject matter jurisdiction. The original complaint was filed March 7, 1977 alleging that plaintiff had been forced into early retirement under threat of termination by defendants in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621 et seq. Violations of 42 U. S. C. § 2000e were also alleged. Jurisdiction is predicated upon 28 U. S. C. §§ 1331 and 1343.

Plaintiff further alleges that by letter dated March 10, 1976, subsequent to his retirement on or about January 31, 1976, "Notice of Intent to Sue" was served on the Secretary of Labor in accordance with the statutory requirements. On April 13, 1977 defendants filed the instant motion to dismiss alleging that a "procedural prerequisite requires the grievant to seek the aid of the appropriate state authority if such an agency has been established to provide relief from alleged age discrimination".

In his resistance, filed April 25, 1977, plaintiff narrows the issue thus presented stating:

> The sole issue before the Court is, then, whether ADEA requires, as a jurisdictional prerequisite, the institution of proceedings before the Iowa Civil Rights Commission prior to the initiation of a United States District Court litigation. Plaintiff asserts that it does not.

Simply stated, plaintiff concedes that no resort has been attempted to the Iowa Commission on Civil Rights. Defendant asserts that such resort is a jurisdictional prerequisite and that the failure to do so is a jurisdictional bar to subsequent litigation in federal court.

Initially the Court notes that many of the cases relied upon by both parties appear to be inapposite. Those cases dealing with the statutory requirement of filing "notice of intent to sue" with the Secertary of Labor differ because of the language of the two statutory provisions. Section 626(d) provides that "[s]uch notice *shall* be filed * * *". This is clearly a mandatory provision and it has been so held by a number of courts considering the issue. See *Woodburn* v. *LTV Aerospace Corp.*, 531 F. 2d 750 (5th Cir., 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F. 2d 393 (6th Cir., 1976); *Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (6th Cir., 1975); *Law* v. *United Airlines Inc.*, 519 F. 2d 170, 171 (10th Cir., 1975); *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F. 2d 1195 (5th Cir., 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (5th Cir., 1974). Cf. *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1315 (8th Cir., 1975).

Section 633(b), on the other hand, does not expressly command the commencement of proceedings under state law. It provides that "no suit may be brought under section 626 of this title before the expiration of sixty days *after proceedings have been commenced under* the State law". See *Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123, 1125-27 (N. D. Ill., 1976). This section is entirely consistent with the interpretation that only when resort has been made to a state agency is the sixty day waiting period mandatory. See *Vasquez* v. *Eastern Air-*

lines, Inc., 405 F. Supp. 1353 (D. Puerto Rico, 1975). It does not mandate initial filing with the state agency.

Secondly, those cases which draw a direct analogy to the procedures utilized under Title VII, 42 U. S. C. §§ 2000e et seq., are also not controlling. Pursuant to the authority of the EEOC and procedures followed thereunder, 29 C. F. R. §§ 1601 et seq., specific language mandates initial deference to specified state agencies. No such procedural requirements apply under the ADEA. In the latter, the statute provides:

> With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor *may*, for the purpose of carrying out their respective functions and duties under this chapter utilize the services of State and local agencies and their employees * * *. (Emphasis added.)

See also 29 C. F. R. §§ 850 et seq. This lack of specific and mandatory deferral provisions seemingly would distinguish the Title VII rationale. See *Love* v. *Pullman*, 404 U. S. 522 (1972); *EEOC* v. *Union Bank*, 408 F. 2d 867 (9th Cir., 1968).

In addition Title VII legislation contains no counterpart to section 633(a) of the ADEA which provides "that upon commencement of action under this chapter such action shall supersede any State action". This section of the ADEA would seem to make mandatory filing with the state agency unnecessary and dilatory. It would, as was noted in *Bertrand, supra,*

> [imply] a belief that Congress would choose to defer to federalism by burdening victims of age discrimination with an obligation to file what will ordinarily be nothing more than a *pro forma* gesture. Mandatory recourse to state remedies, which need not be exhausted, would normally be a dilatory exercise or a 'procedural pitfall for unsuspecting individuals'.

Bertrand v. *Orkin Exterminating Co., supra* at 1127 *quoting Vazquez* v. *Eastern Airlines, Inc., supra* at 1357. Such a con-

struction is supported also by Judge Garth in his concurring opinion in *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir., 1974), in which it was stated:

> I do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633 (b), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a).

Goger v. *H. K. Porter Co., supra* at 18. See also *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430, 433 (E. D. Mich., 1976). Finally, in *Goger, supra*, although stating that timely resort should be taken to state agencies, the court nonetheless vacated an order of dismissal entered by the district court because of equitable considerations. Had the court considered section 633(b) to be jurisdictional despite the existence of section 633 (a) it would have lacked the power to grant equitable relief. See *Magalotti* v. *Ford Motor Co., supra* at 432.

This Court adopts the rationale of those cases which have held that resort to the state agency is not a jurisdictional prerequisite to the filing of an action in Federal Court. *See Bertrand v. Orkin Exterminating Co., supra; Smith* v. *Joseph Schlitz Brewing Co.*, 419 F. Supp. 771 (D. N. J., 1976); *Magalotti* v. *Ford Motor Co., supra; Vazquez* v. *Eastern Airlines, Inc., supra; Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H., 1975).

It is apparent that in certain areas there exists a great deal of similarity between the ADEA and Title VII legislation. In particular section 7 of the ADEA, 29 U. S. C. §§ 626(c)-(e) and § 706(c) of the 1964 civil rights act 42 U. S. C. §§ 2000e-5(b)-(d) are both jurisdictional sections containing similar language, yet the ADEA "is embodied in a separate act and has its own unique history * * *". *Laugesen* v. *Anaconda Co.*, 510 F. 2d 307, 312 (6th Cir., 1975). This would indicate that automatic adoption of Title VII guidelines would be inappropriate. See

H. R. No. 805, 2 U. S. Code Cong. & Ad. News 2213 (1967). Section 7 thus does not make the filing of an administrative charge with the appropriate state agency a jurisdictional step. Its only requirement in the case of an age discrimination complaint is that the Secretary of Labor be afforded timely notice of intent to file suit in federal court. The purpose of such filing is to enable the Secretary to attempt to eliminate the alleged violation through the informal methods of conciliation, conference and persuasion as expeditiously as possible.

In contrast, section 14 of the ADEA, 29 U. S. C. § 633 providing for deferral by the Secretary in cases in which a complaint has been filed with the appropriate state agency is not a jurisdictional section and sets forth no jurisdictional steps for instituting suit in federal court. This section deals solely with the relationship between federal and state law. This is clear from the very heading of the section which is entitled "Federal-State relationship" and is captioned Limitation of Federal action upon commencement of State proceedings. It is this Court's opinion that such section is a Congressional recognition of the sensitive relationship between federal and state governments. It affords states a reasonable opportunity to settle age discrimination problems before federal action if a party has resorted to a state complaint. There is however, no indication that such filing is a compulsory prerequisite to federal jurisdiction.

Congress specifically rejected agency enforcement proceedings analogous to those utilized by the EEOC because of the inherent delay involved in such procedures. Compare S. 830 90th Cong. 1st Sess. (113 Cong. Rec. 2794-2796) to the final version of the Act. As Senator Javits noted:

> By utilizing the courts rather than [administrative agencies] as the forum to hear cases arising under the law, these delays may be largely avoided * * * [i]n the case of older citizens to whom by definition, relatively few productive years are left.

Statements by Senator Javits, Hearings Before the Subcommittee on Labor, United States Senate, 113 Cong. Rec. 7076, 90th Cong. 1st Sess. (1967). See *Bertrand* v. *Orkin Exterminating Co., supra; Vazquez* v. *Eastern Airlines, Inc., supra.*

There exists no dispute between the parties to this suit that the Iowa Commission on Civil Rights is properly an agency to which deferral could have been made in the first instance. However, this was not done and it is the specific holding of this Court that such resort is not a mandatory nor jurisdictional prerequisite to the filing of an ADEA suit in federal court. This interpretation is consistent with the Eighth Circuit directive that "[t]he Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination * * *. A procedural requirement of the Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act". See *Moses* v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 92-94 (8th Cir., 1975).

With regard to plaintiff's claim pursuant to Title VII, however, the motion to dismiss must be granted. Plaintiff has not resisted the motion to dismiss on this ground. Further, as defendant correctly points out, Title VII has no application in age discrimination cases and plaintiff has totally failed to allege compliance with the statutory prerequisites to the initiation of such an action in Federal Court pursuant to Title VII. See *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (8th Cir., 1975).

IT IS THEREFORE ORDERED that defendant's motion to dismiss with regard to plaintiff's cause of action premised on 42 U. S. C. §§ 2000e et seq., shall be, and the same are hereby granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss the cause of action pursuant to the Age Discrimination

in Employment Act, 29 U. S. C. §§ 621 et seq., shall be, and the same is hereby denied.

Signed this 8th day of July, 1977.

/s/ W. C. STUART,
W. C. Stuart,
U. S. District Judge, Southern District of Iowa.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 77-1692

JOSEPH W. EVANS, *Appellee,*

vs.

OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, and PAUL F. GOULD, *Appellants.*

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 12, 1978
Filed: April 5, 1978

Before BRIGHT and HENLEY, *Circuit Judges,* and TALBOT SMITH, *Senior District Judge.**

BRIGHT, *Circuit Judge.*

Joseph Evans brought this suit against his employer, Oscar Mayer & Company, and its executives,[1] charging that they forced Evans into early retirement in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621-634 (1970). Oscar Mayer moved to dismiss the action for want of jurisdiction. The district court denied the motion and certified this interlocutory ruling for appeal under 28 U. S. C.

1. In this opinion we shall refer to the defendants collectively as "Oscar Mayer."

TALBOT SMITH, *United States Senior District Judge,* District of Michigan, sitting by designation.

§ 1292(b) (1970), stating that the order presented "a controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal * * * may materially advance the ultimate outcome of the litigation." This court thereafter permitted this appeal. We vacate the district court's order and remand for further proceedings.

Joseph Evans worked for Oscar Mayer & Co. in Davenport, Iowa, for twenty-three years before his retirement on January 31, 1976. On March 10, 1976, Evans notified the Secretary of Labor, as required by 29 U. S. C. § 626(d),[2] that he intended to sue Oscar Mayer under the ADEA. He filed the present action in federal district court on May 7, 1977. Thereafter, Oscar Mayer moved to dismiss the action for lack of subject matter jurisdiction, arguing that Evans had not fulfilled a jurisdictional requirement under 29 U. S. C. § 633(b) because he did not first file charges with the Iowa Civil Rights Commission. The district court concluded that filing charges with an appropriate state agency is not a jurisdictional prerequisite to an action in federal court. It therefore denied the motion, and Oscar Mayer appealed.

2. Section 626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Section 633(b) of the ADEA reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law*, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. [Emphasis added.]

Iowa has a law prohibiting age discrimination in employment,[3] and the Iowa Civil Rights Commission has the authority to seek relief from such practices. The narrow issue raised on appeal is whether filing a claim with the state agency is a prerequisite to a suit under the ADEA.

A definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it. The extensive discussions found in *Vazquez* v. *Eastern Airlines, Inc.*, 405 F. Supp. 1353 (D. P. R. 1975) (filing with state agency not required), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976) (filing with state agency is required), demonstrate that substantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, *see Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 666 (E. D. Mich. 1976); *Fitzgerald* v. *New England Telephone and Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976), *modified*, 437 F. Supp. 635 (1977); *Berry* v. *Crocker National Bank*, 13 FEP Cases 673 (N. D. Cal. 1976), while other courts have held it to be optional, *see Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N. J. 1976); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E. D. Mich. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H. 1975).

3. Iowa Code Ann. § 601A.6 (1975).

We conclude that, in a state having laws that prohibit age discrimination and having an agency with authority to seek relief from such practices, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court.

Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible, for lengthy delays in the courts and administrative agencies could deprive older workers of an effective remedy. Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Although Congress patterned much of the ADEA after Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-2000e-17 (1970), and other labor statutes, it rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. *Vazquez* v. *Eastern Air Lines, Inc., supra*, 405 F. Supp. at 1354-55. Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief

through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increases the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the Secretary of Labor. *Bertsch* v. *Ford Motor Co., supra,* 415 F. Supp. at 623.

Moreover, the pertinent language of section 633(b) is nearly identical to language in Title VII:

> In the case of an alleged unlawful employment practice occurring in a State * * * which has a * * * law prohibiting the unlawful employment practice alleged and establishing or authorizing a State * * * authority to grant or seek relief from such practice * * *, no charge may be filed * * * by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated * * *. [42 U. S. C. § 2000e-5(b) (1970).]

This language of Title VII requires that state agencies be afforded an opportunity to consider the employment discrimination before suit for redress may be brought in a federal court. *See Love* v. *Pullman Co.,* 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.,* 511 F. 2d 1228 (8th Cir. 1975).

The requirement that a charge be filed with an appropriate state agency is not, however, "jurisdictional;" it is a procedural requirement, which may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII, *see Lacy* v. *Chrysler Corp.,* 533 F. 2d 353 (8th Cir., *cert. denied,* 429 U. S. 959 (1976); *Tuft* v. *McDonnell Douglas Corp.,* 517 F. 2d 1301 (8th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.,* 516 F. 2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.,* 495

F. 2d 398 (5th Cir. 1974), *rev'd on other grounds,* 424 U. S. 747 (1976), and we feel it should apply to the present case.

The question remains, therefore, whether Evans should be allowed, on equitable grounds, to proceed with his action despite his failure to file a complaint with the Iowa Civil Rights Commission.[4] In his resistance to Oscar Mayer's motion to dismiss, Evans argued that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of section 633(b) by this court to guide him. *See Goger* v. *H. K. Porter Co., supra,* 492 F. 2d at 16-17. The district court did not reach this question in disposing of Oscar Mayer's motion. We therefore vacate the district court's order and remand for further proceedings, consistent with this opinion, on the pending motion for dismissal.

HENLEY, *Circuit Judge,* dissenting.

While the majority says that the "requirement" of § 633(b) that Mr. Evans file a complaint with the Iowa Civil Rights Commission before commencing his federal suit under the provisions of § 626(c) is not "jurisdictional", still the majority holds that prior filing with the state agency was a procedural requirement, and that noncompliance with the requirement may be excused only on the basis of equitable considerations which may or may not be present in a particular case.

I respectfully disagree. I think that it is correct to say that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by § 633(b). However, I am not persuaded that an individual is required to file a complaint with the state

4. Iowa Code Ann. § 601A.14(15) (1975) requires that a complaint be filed within 120 days after the discriminatory practice occurred. This period has run. Therefore, Evans apparently no longer can comply with the state agency filing requirement.

agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by § 626(d). I think that the individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency.

The majority and I both recognize that the cases are in conflict. I prefer the view set out by Judge Garth in his concurring opinion in *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13, 17-18 (3d Cir. 1974), and for that reason I dissent. I would affirm the action of the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS.
for the Eighth Circuit.

No. 77-1692

JOSEPH W. EVANS,
Appellee,

vs.

OSCAR MAYER & CO., ROBERT M. BOLZ, N. D. OTTENS, DONALD L. PAUL, and PAUL F. GOULD,
Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

OPINION ON REHEARING.

Before BRIGHT and HENLEY, *Circuit Judges*, and TALBOT SMITH, *Senior District Judge.**

HENLEY, *Circuit Judge.*

Joseph W. Evans brought this suit against his employer, Oscar Mayer & Co., and its executives,[1] charging that they had forced him into early retirement in violation of the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 621-634 (1970). Oscar Mayer moved to dismiss the action

* TALBOT SMITH, *United States Senior District Judge,* Eastern District of Michigan, sitting by designation.

1. In this opinion we shall refer to the defendants collectively as "Oscar Mayer."

for want of jurisdiction. The district court denied the motion and certified this interlocutory ruling for appeal under 28 U. S. C. § 1292(b) (1970), stating that the order presented a "controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal . . . may materially advance the ultimate outcome of the litigation." This court thereafter permitted this appeal.

The case was argued and submitted on January 12, 1978, and was decided on April 5 of this year. A majority of the court voted to vacate the order of the district court and to remand the case for further proceedings. Thereafter, the plaintiff-appellee filed a petition for rehearing and suggestions for rehearing en banc. Plaintiff was supported in his position by the Secretary of Labor who is charged with the duty of enforcing ADEA but who was not a party to the original action. The Secretary was permitted to file an amicus curiae brief taking the position that the district court had jurisdiction of the case, and that the original determination of the district court was correct.

In his brief the Secretary pointed out that two days after our original decision was announced, the Court of Appeals for the Sixth Circuit had reached an opposite result in *Gabriele* v. *Chrysler Corp.*, ... F. 2d ..... (6th Cir. No. 76-2265 April 7, 1978), and that that court had adhered to *Gabriele* in an order entered on April 10, 1978 in *Simpson* v. *Whirlpool Corp.*, ... F. 2d ..... (6th Cir. No. 76-2195 April 10, 1978).

We have given careful consideration to the matter. We grant rehearing, withdraw our original opinion and substitute this one in its stead. This time, we affirm the order of the district court.

Joseph Evans worked for Oscar Mayer & Co. in Davenport, Iowa for twenty-three years before his retirement on January 31, 1976. On March 10, 1976 Evans notified the Secretary of Labor, as required by 29 U. S. C. § 626(d),[2] that he intended

2. Section 626(d) provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less

(Footnote continued on next page.)

to sue Oscar Mayer under the ADEA. He filed the present action in federal district court on May 7, 1977. Thereafter Oscar Mayer moved to dismiss the action for lack of subject matter jurisdiction, arguing that Evans had not fulfilled a jurisdictional requirement under 29 U. S. C. § 633(b) because he did not first file charges with the Iowa Civil Rights Commission. The district court concluded that filing charges with an appropriate state agency is not a jurisdictional prerequisite to an action in federal court. It therefore denied the motion, and Oscar Mayer appealed.

Section 633(b) of the ADEA reads as follows:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated: *Provided,* that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based the proceeding shall be deemed to have been com-

(Footnote continued from preceding page.)

> than sixty days' notice of an intent to file such action. Such notice shall be filed—
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> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

menced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority. [Emphasis added.]

Iowa has a law prohibiting age discrimination in employment,[3] and the Iowa Civil Rights Commission has the authority to seek relief from such practices. The narrow issue raised on appeal is whether filing a claim with the state agency is a prerequisite to a suit under the ADEA.

A definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it. The extensive discussions found in *Vazquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D. P. R. 1975) (filing with state agency not required), and *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E. D. Mich. 1976) (filing with state agency is required), demonstrate that substantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, *see Reich* v. *Dow Badische Co.*, ... F. 2d ....., 17 FEP Cases 363 (2d Cir. No. 76-7637, April 4, 1978), including the dissenting opinion of Judge Feinberg; *Curry* v. *Continental Airlines*, 513 F. 2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13 (3d Cir. 1974); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 666 (E. D. Mich. 1976), *rev'd*, ... F. 2d ..... (6th Cir. 1978), *supra; Fitzgerald* v. *New England Telephone & Telegraph Co.*, 416 F. Supp. 617 (D. Mass. 1976), *modified*, 437 F. Supp. 633 (1977); *Berry* v. *Crocker Nat'l Bank*, 13 FEP Cases 673 (N. D. Cal. 1976), while other courts have held it to be optional, *see Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp. 1123 (N. D. Ill. 1976); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D. N. J. 1976); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E. D. Mich. 1976); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D. N. H. 1975).

While it is obvious that the authorities are in conflict, and the question is not free from doubt, we think that the preferable

3. Iowa Code Ann. § 601A.6 (1975).

view is that taken by the Court of Appeals for the Sixth Circuit in *Gabriele, supra,* and which is also expressed in the concurring opinion of Judge Garth in *Goger* v. *H. K. Porter Co., supra,* 492 F. 2d at 17-18. We now hold that if an individual complaining about alleged discrimination against him in employment on account of his age in fact files a complaint with a state fair employment practice agency like the Iowa Civil Rights Commission, he must observe the waiting period prescribed by § 633(b). We do not think, however, that an individual is required to file a complaint with the state agency before coming into federal court, assuming that he complies with the basic waiting period prescribed by § 626(d). In our opinion such an individual has the option of proceeding first before the state agency and then in the federal court or of proceeding initially in the federal court without prior resort to the state agency.

The views here expressed are in accord with the interpretation that the Secretary places on § 633(b), and it goes without saying that his interpretation of the Act is entitled to great weight. *See, e.g., Van Wyk* v. *Bergland, Secretary of Agriculture,* 570 F. 2d 701, 704 (8th Cir. 1978), and cases cited.

Affirmed.

BRIGHT, *Circuit Judge,* dissenting.

I respectfully dissent.

In my judgment, in a state such as Iowa, which has laws prohibiting age discrimination and an agency with authority to seek relief from such practice, filing a charge with the state agency is mandatory under the ADEA and is a prerequisite to the filing of an action in federal court, subject, however, to certain considerations. *See Reich* v. *Dow Badische Co.*, 17 FEP Cases 363, 368 (2d Cir. 1978); *Goger* v. *H. K. Porter Co.*, 492 F. 2d 13, 16 (3d Cir. 1974).

Congress clearly intended that discrimination on the basis of age be remedied as quickly and efficiently as possible, for lengthy delays in the courts and administrative agencies could

deprive older workers of an effective remedy. Section 626(d) of the ADEA expressly requires the claimant to notify the Secretary of Labor before filing suit and requires the Secretary to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Although Congress patterned much of the ADEA after Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-2000e-17 (1970), and other labor statutes, it rejected a proposed enforcement procedure that would have subjected ADEA complaints to the same delays that plague the EEOC and NLRB. *Vazquez* v. *Eastern Air Lines, Inc., supra,* 405 F. Supp. at 1354-55. Instead, the claimant need defer to the Secretary of Labor and the state agency for only sixty days before bringing suit. Thus, in those cases in which the Secretary of Labor or the state agency is able to provide speedy relief, the claimant can escape the delay inherent in any federal court action. On the other hand, if prompt relief cannot be obtained, the claimant may bring an action after waiting only sixty days. Requiring a claimant to seek relief through a state agency designed specifically to handle this type of case is consistent with congressional intent. It increases the chances of conciliation while creating no additional delay, for the sixty-day period of deference to the state agency may run concurrently with the sixty-day period of deference to the Secretary of Labor. *Bertsch* v. *Ford Motor Co., supra,* 415 F. Supp. at 623.

Moreover, the pertinent language of section 633(b) is nearly identical to language in Title VII:

> In the case of an alleged unlawful employment practice occurring in a State * * * which has a * * * law prohibiting the unlawful employment practice alleged and establishing or authorizing a State * * * authority to grant or seek relief from such practice * * *, no charge may be filed * * * by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated * * *. [42 U. S. C. § 2000e-5(b) (1970) (currently at § 2000e-5(c)).]

This language of Title VII requires that state agencies be afforded an opportunity to consider the employment discrimination before suit for redress may be brought in a federal court. *See Love* v. *Pullman Co.,* 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.,* 511 F. 2d 1228 (8th Cir. 1975).

In the present cases, however, I would not dismiss the action outright, even though Evans failed to file a charge with the state agency. That requirement is not "jurisdictional"; it is a procedural requirement, which may be subject to equitable modification when necessary to effect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII, *see Lacy* v. *Chrysler Corp.,* 533 F. 2d 353 (8th Cir.), *cert. denied,* 429 U. S. 959 (1976); *Tuft* v. *McDonnell Douglas Corp.,* 517 F. 2d 1301 (8th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.,* 516 F. 2d 924 (5th Cir. 1975); *Franks* v. *Bowman Transportation Co.,* 495 F. 2d 398 (5th Cir. 1974), *rev'd on other grounds,* 424 U. S. 747 (1976), and I feel it should apply to the present case.

In his resistance to Oscar Mayer's motion to dismiss, Evans argued that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of section 633(b) by this court to guide him. *See Goger* v. *H. K. Porter Co.,* 492 F. 2d 13, 16-17 (3d Cir. 1974). The district court did not reach this question in disposing of Oscar Mayer's motion. I would, therefore, vacate the district court's order and remand for further proceedings on the motion to dismiss.

July 6, 1978

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 77-1692. September Term, 1977

JOSEPH W. EVANS,
Appellee,

vs.

OSCAR MAYER & Co., et al,
Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

Petition for rehearing en banc filed by counsel for appellee is denied.

Judges Bright and Ross would vote for petition for rehearing en banc essentially for the reasons set forth in Judge Bright's dissent to the opinion filed July 6, 1978.

July 7, 1978

APPENDIX B.

Statutes Involved.

Section 14(b) of the Age Discrimination in Employment Act, 29 U. S. C. § 633(b), reads as follows:

> "(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority, other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

Section 7(d) of the Age Discrimination in Employment Act, 29 U. S. C. § 626(d), reads as follows:

> "(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> "(1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> "(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

"Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(c), reads as follows:

"(c) In the case of an alleged unlawful employment practice occuring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."